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No. 88-985

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether this Court should summarily reverse the United States Court of Appeals for the Third Circuit when, on remand from this Court for further consideration in light of *Christianson* v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166 (1988), the Third Circuit refused to transfer to the Federal Circuit an appeal from the final decision of a district court in which jurisdiction was indisputably based on a claim expressly arising under the patent laws, as mandated by 28 U.S.C. § 1295(a)(1).

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. ——

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Technograph Liquidating Trust ("Technograph") hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.[1]

OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit (App., *infra*, 1a-10a) is reported at 857 F.2d 197 (3d Cir. 1988).

JURISDICTION

The opinion of the Third Circuit was entered on September 15, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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[1] The only petitioner in this case is Technograph Liquidating Trust, successor to Technograph, Inc., a North Carolina corporation. The other named plaintiffs below no longer have any interest in this litigation.

STATUTORY PROVISIONS INVOLVED

The Federal Courts Improvement Act of 1982, 28 U.S.C. § 1295(a)(1), which created the Court of Appeals for the Federal Circuit, provides, in pertinent part:

> The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—(1) of an appeal from a final decision of a district court of the United States . . . if the jurisdiction of that court was based, in whole or in part, on section 1338 of this title . . . .

The statute governing jurisdiction under the patent laws, 28 U.S.C. § 1338, provides, in pertinent part:

> (a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents . . . .

The statute governing transfer between the courts of appeals, 28 U.S.C. § 1631, provides, in pertinent part:

> Whenever . . . an appeal . . . is noticed for or filed with such a court and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred . . . .

STATEMENT

Petitioner filed a petition for certiorari on October 27, 1987, which raised the same legal issue that is the subject of this petition for certiorari. *See Technograph Liquidating Trust* v. *General Motors Corp.*, Petition for Certiorari, No. 87-682 (*"Technograph I"*).[2] On June 27,

[2] All citations to *"Technograph I"* refer to the Supreme Court's grant, vacate and remand order (*Technograph Liquidating Trust* v. *General Motors Corp.*, 108 S.Ct. 2862 (June 27, 1988)) and the briefs and appendix on the petition for certiorari.

1988, this Court granted that petition, vacated the judgment below, and remanded the case to the Third Circuit for further consideration in light of *Christianson* v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166 (June 17, 1988). App., *infra*, 11a. On remand, however, the Third Circuit chose to ignore the holding in *Christianson* and reaffirmed its previous judgment. *Devex Corp.* v. *General Motors Corp.*, 857 F.2d 197 (3d Cir. Sept. 15, 1988). App., *infra*, 1a. This petition seeks review and summary reversal of that Third Circuit decision to retain jurisdiction of the appeal.

Background

The complaint explicitly provides that this action was brought as a "civil action for patent infringement." *Technograph I* App., 20a. The Third Circuit decision on remand recognized as much: "The original complaint, alleg[ed] infringement on a patented process for cold-forming operations on steel products used in bumper and non-bumper parts for automobiles . . . ." App., *infra*, 3a-4a. From the outset, the *only* basis of district court jurisdiction over this case has been the "Patent Laws of the United States." *Technograph I* App., 20a. 28 U.S.C. § 1338.

In 1986, petitioner filed a motion in the United States District Court for the District of Delaware seeking (a) reconsideration of the failure to award any royalty whatsoever on the manufacture of 1.3 billion non-bumper parts already found to be an infringement and (b) additional post-judgment interest for patent infringement on bumpers.[3] On June 27, 1986, petitioner's motion was denied. *Technograph I* App., 19a.

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[3] Petitioner's patent was held valid, *Devex Corp.* v. *General Motors Corp.*, 321 F.2d 234 (7th Cir. 1963), *cert. denied*, 375 U.S.

Petitioner appealed to the Federal Circuit, pursuant to 28 U.S.C. § 1295(a)(1). On motion of respondent, the Federal Circuit transferred the appeal to the Third Circuit on the ground that the transfer best served "the interests of comity and judicial economy." *Technograph I* App., 2a-3a. The Federal Circuit made no finding of a "want of jurisdiction" as required by the transfer statute, 28 U.S.C. § 1631. Thereafter, Technograph moved in the Third Circuit to transfer the case back to the Federal Circuit. That motion was denied, without explanation. *Technograph I* App., 8a.[4] On June 29, 1987, the Third Circuit affirmed, without opinion, the decision of the district court. *Technograph I* App., 25a.

Technograph petitioned for a writ of certiorari (No. 87-682) following the June 29 order, arguing that the Third Circuit's exercise of jurisdiction over the appeal in this patent case was "flatly contrary to the language and intent of the Federal Courts Improvement Act,"

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971 (1964), and respondent was found to have infringed the patent in its production of automobile bumper and non-bumper parts. *Devex Corp.* v. *General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973). Technograph was awarded damages of a reasonable royalty for the infringement relating to bumper parts and prejudgment interest on that royalty. *Devex Corp.* v. *General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981), *aff'd*, 461 U.S. 648 (1983) (affirming award of prejudgment interest). No royalty was awarded for the infringement of 1.3 billion *non-bumper* parts, despite the statutory requirement that "*in no event* less than a reasonable royalty" must be awarded upon a finding of infringement, 35 U.S.C. § 284. *Devex Corp.* v. *General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981), *cert. denied*, 456 U.S. 990 (1982). The amount and method of calculating post-judgment interest were determined in *Devex Corp.* v. *General Motors Corp.*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 474 U.S. 819 (1985).

[4] Technograph filed petitions for writs of certiorari from the Federal Circuit's interlocutory order transferring the case and from the Third Circuit's interlocutory denial of Technograph's motion to retransfer the case to the Federal Circuit. Both of those petitions were denied. 480 U.S. 918 (1987).

Technograph I Pet., 5. The petition specifically noted that a decision on the then-pending petition for writ of certiorari in *Christianson* v. *Colt Industries Operating Corp.*, No. 87-499, "would likely affect the proper disposition of [Technograph]." *Technograph I* Pet., 11. Because *Christianson* and *Technograph* presented complementary issues, petitioner suggested "[a]t a minimum," that the Court "hold this petition pending the outcome of the *Christianson* case. . . ." *Technograph I* Pet., 11, 12.

This Court granted the petition in *Christianson*, and unanimously held, on June 17, 1988, that the statute means what it says: the Federal Circuit has *exclusive* jurisdiction over those cases "arising under" the patent laws, as measured by the well-pleaded complaint. *Christianson* v. *Colt Industries Operating Corp.*, 108 S.Ct. 2166 (1988). This Court explicitly stated that the relevant focus in determining appellate jurisdiction is *the jurisdiction of the district court. Id.* at 2176.

On June 27, 1988, this Court granted the *Technograph* petition, vacated the judgment of the Third Circuit and remanded for reconsideration in light of *Christianson.* App., *infra*, 11a. Because jurisdiction under petitioner's complaint was based exclusively on patent law, the *Christianson* holding that "jurisdiction is determined by reference to the well-pleaded complaint" required the Third Circuit to transfer the case to the Federal Circuit. *Christianson*, 108 S.Ct. at 2176.

On remand, the Third Circuit refused to transfer the case despite the holding of *Christianson.* App., *infra*, 3a. In doing so, the court offered two rationales for its decision to retain jurisdiction. First, the court assumed that "all phases" of the case "disputing actual patent issues had been concluded" and "only damages were involved in most of the litigation." Thus, the court concluded that the matters still "remaining" in the case

"did not raise questions of the validity of the patent or its infringement." App., *infra*, 5a. Second, the court noted that the *Christianson* opinion stated that application of the law of the case doctrine was appropriate where the initial transfer decision was "plausible." App., *infra*, 6a. The court thus concluded—without any explanation of how the Third Circuit's jurisdiction could be deemed "plausible"—that it would follow the Federal Circuit's decision on jurisdiction. District Judge Pollak concurred separately. *See* app., *infra*, 7a.

REASONS FOR GRANTING THE PETITION

The court below refused to follow the remand order of this Court to reconsider its jurisdiction "*in light of Christianson* v. *Colt Industries*" and instead resolved the issue on remand *in spite of Christianson*. Rather than accept the clear holding of *Christianson*, the Third Circuit evaded that holding in a way that clouds the very issue of appellate jurisdiction that this Court had clarified in *Christianson*. The court of appeals' reliance upon the law of the case doctrine completely misses the point that the doctrine does not apply where, as here, an intervening decision of a higher court compels a contrary result. Because the Third Circuit's decision is in direct conflict with a recent decision of this Court and likely will give rise to further litigation on issues that *Christianson* should have resolved, this Court should grant certiorari and summarily reverse the decision below.

1. The conflict between the decision below and this Court's decision in *Christianson* could not be more plain. *Christianson* held that the Federal Circuit has exclusive jurisdiction over any case in which "federal patent law creates the cause of action." 108 S.Ct. at 2173. In other words, appellate jurisdiction under 28 U.S.C. § 1295(a)(1) turns solely on the district court's jurisdiction under the well-pleaded complaint rule. Under that simple stand-

ard, reference to the complaint readily resolves any question about the jurisdiction of this—or any other—appeal. Thus, the proper outcome in this case is clear and direct: because there is *no dispute* that this case arises under the patent laws, the Federal Circuit has exclusive jurisdiction of the appeal.

The Third Circuit completely ignored that straightforward analysis. Noticeably absent from its latest opinion is *any* reference to the following holding of *Christianson* regarding 28 U.S.C. § 1295(a)(1):

> Since the district court's jurisdiction is determined by *reference to the well-pleaded complaint, not the well-tried case, the referent for the Federal Circuit's jurisdiction must be the same.* The legislative history of the Federal Circuit's jurisdictional provisions confirms that focus.

108 S. Ct. at 2176 (emphasis added).

In following the congressional directive and the explicit statutory language that Federal Circuit jurisdiction is determined by reference to the jurisdiction of the district court, this Court explicitly *rejected* any analysis that focused on the issues actually litigated or on appeal:

> Colt might be correct (although not clearly so) that Congress' goals would be better served if the Federal Circuit's jurisdiction were to be fixed "by reference to the case actually litigated," rather than by an *ex ante* hypothetical assessment of the elements of the complaint that might have been dispositive. Brief for Respondent 31. Congress determined the relevant focus, however, when it granted jurisdiction to the Federal Circuit over "an appeal from . . . a district court . . . if the jurisdiction of *that court* was based . . . on section 1338." 28 U.S.C. § 1295(a)(1) (emphasis added).

108 S.Ct. at 2176; original emphasis. Accordingly, the rule under Section 1295(a)(1) applies regardless of the timing of, or the issues on, the appeal. In *Technograph*,

the patent laws were the *only* basis for the district court's jurisdiction. Thus, the appeal must proceed in the Federal Circuit because the district court's jurisdiction *continues* to arise under 28 U.S.C. § 1338. Thus, the Third Circuit's statement that "all phases disputing actual patent issues had been concluded . . . by 1982" and "only damages were involved in most of the litigation" is completely irrelevant and a direct affront to the holding in *Christianson*.[5]

This Court should not permit the decision below to undermine the unanimous decision in *Christianson* just as the ink on that opinion dries. Summary reversal of the decision below is appropriate because the rule of law set forth in *Christianson* is clear and controls this case. *See Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) (summary reversal on second petition for certiorari for failure to apply intervening decision on remand); *Henry* v. *City of Rock Hill*, 376 U.S. 776 (1964) (following reaffirmance on remand, Supreme Court summarily reversed because intervening decision controlled the result.) Indeed, given the Third Circuit's palpable refusal

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[5] The statement that "all phases disputing actual patent issues had been concluded" is plainly inaccurate. As the issues on appeal demonstrate, the appeal involves critical patent law issues under 35 U.S.C. § 284: whether a "reasonable royalty" must be awarded upon a finding of infringement given the statutory mandate that damages "adequate to compensate," but "*in no event* less than a reasonable royalty" must be awarded upon a finding of infringement. (Brief for Plaintiff-Appellant in Third Circuit on the merits, 3-4.) Reconsideration of the failure to award a royalty is necessarily a patent issue. What is more, the court of appeals' own opinion recognized that, as late as 1985, patent issues remained in this case. App., *infra*, 5a ("Plaintiff also asked the Court once again to review the non-bumper part infringement").

Moreover, the Third Circuit erred in considering the October 1, 1982 effective date of the Federal Courts Improvement Act as relevant to its decision. In that regard, the only significant point is that the notice of appeal was filed after the 1982 effective date—as it obviously was in *Technograph* because the order appealed from

to apply *Christianson*, summary reversal is warranted to protect the integrity of this Court's decision. *See Sumner* v. *Mata*, 455 U.S. 591 (1982) (Supreme Court summarily vacated court of appeals' second decision which failed to comply with Supreme Court's prior remand).

2. Instead of applying the straightforward rule in *Christianson*, the Third Circuit attempted to distinguish *Christianson* on the following grounds:

> Here the Supreme Court denied certiorari after the Federal Circuit declined jurisdiction and transferred the case to this court. The lengthy history of this litigation and the substantial reasons supporting the Federal Circuit's order, at best, makes this what the Supreme Court characterized as a "marginal jurisdictional dispute." *Id.* at 2179.

App., *infra*, 6a.

The Third Circuit's assertion is plainly wrong. First, this Court's denial of the 1987 petition for certiorari from the interlocutory transfer order is totally irrelevant. *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365-66, n.1 (1973); *Hathorn* v. *Lovorn*, 457 U.S. 255, 262, n.11 (1982). Rather, this Court's subsequent *grant* of the petition on the identical issue is significant. Astonishingly, the Third Circuit attaches significance to the earlier denial and ignores the importance of the later grant of the petition.

Second, neither "the lengthy history of the litigation" nor the "substantial reasons supporting the Federal Circuit's order" could convert this clear case into a "mar-

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was rendered on June 27, 1986. Beyond all doubt, the Federal Circuit has mandatory exclusive jurisdiction of post-1982 appeals in patent cases in which earlier appeals were decided by the regional courts of appeals. *E.g. Central Soya Co.* v. *Geo. A. Hormel & Co.*, 723 F.2d 1573, 1580 (Fed. Cir. 1983). The 1982 effective date is irrelevant for appeals from decisions rendered in 1986 so long as the jurisdiction of the district court rendering that decision arose under the patent laws, which is undeniable here.

ginal jurisdictional dispute." *Christianson* provided a bright-line standard that made the history of any litigation irrelevant to the jurisdictional question. The Federal Circuit's justification for the transfer—comity and judicial economy—are irrelevant to the jurisdictional question. "If the jurisdiction of . . . [the district] court was based . . . on Section 1338," then Congress mandated exclusive jurisdiction over the appeal to the Federal Circuit. *Christianson*, 108 S.Ct. at 2176.

Moreover, in *Christianson* this Court explicitly held that the transferee court is "*obliged* to decline jurisdiction" where the transfer order was "clearly wrong." *Christianson*, 108 S.Ct. at 2178 (emphasis added). Here, the transfer order of the Federal Circuit was "clearly wrong." It is undisputed that the *only* basis for district court jurisdiction in this case was the patent laws and *Christianson* unequivocally held that jurisdiction over appeals in such cases is exclusively in the Federal Circuit.[6]

3. Under the doctrine of law of the case, a prior decision must be abandoned in favor of an intervening decision that compels a contrary result. "It is clear . . . that a decision of the Supreme Court directly in point, irreconcilable with the decision on the first appeal, and rendered in the interim, *must* be followed on the second appeal, despite the doctrine of the law of the case." 1B J. Moore,

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[6] The Third Circuit's refusal "[t]o transfer the case to the Federal Circuit at this stage . . ." ignores the well-settled rule that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon* v. *Sill*, 49 U.S. 441, 449 (1850), quoted in *Christianson*, 108 S.Ct. at 2178. Transfer at any stage is *imperative* where the court has no jurisdiction. In *Christianson* this Court reversed the Federal Circuit for deciding the merits of a case "in the interest of justice" where it lacked jurisdiction. *See Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). Similarly, this Court should reverse the Third Circuit for reaching the merits in *Technograph* because *Christianson* has made it abundantly clear that the Third Circuit lacks jurisdiction and the Federal Circuit has exclusive jurisdiction of this case.

J. Lucas & T. Currier, Moore's Federal Practice, ¶ 404[1] at 121-122 (2d ed. 1988) (original emphasis; footnotes omitted); *EEOC* v. *K-Mart Corp.*, 796 F.2d 139, 146 (6th Cir. 1986) (prior opinion of another panel "clearly cannot control as opposed to an opposite view expressed in final language by the United States Supreme Court in a similar case.") The remand order from this Court in *Technograph* directed the Third Circuit to reconsider its jurisdiction in light of the intervening decision of *Christianson* and the Third Circuit was required to follow the unambiguous jurisdictional holding of *Christianson* rather than rely upon the preceding Federal Circuit transfer order.

This case presents this Court with an indisputable evasion of its order to the Third Circuit to reconsider the jurisdictional issue "*in light of Christianson* v. *Colt Industries.*" The Third Circuit's refusal properly to reconsider the case has not only left the decision below in a court that plainly lacks jurisdiction, it also has resulted in a blurring of the bright line standard in *Christianson* that is likely to create additional conflict and confusion on this issue of appellate jurisdiction. Because the decision conflicts with the recent decision of this Court, this Court should grant certiorari and summarily reverse the decision below.

CONCLUSION

The petition for a writ of certiorari should be granted, the decision below vacated and remanded with a direction to transfer the appeal to the Federal Circuit.

Respectfully submitted,

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December 12, 1988

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5771

DEVEX CORPORATION, TECHNOGRAPH, INC., WILLIAM C. McCOY, THEODORE A. TE GROTENHUIS, FREDERICK K. ZIESENHEIM, MARJORIE TE GROTENHUIS, WILLIAM C. McCOY, JR., and KATHERINE M. BASSETT,

Appellants

v.

GENERAL MOTORS CORPORATION

Appeal from the United States District Court
for the District of Delaware

(D.C. Civil No. 3058)

Submitted Pursuant To Third Circuit Rule 12(6)
June 25, 1987

Decided June 29, 1987

Certiorari Granted June 27, 1988

Vacated and On Remand from the
Supreme Court of the United States
June 27, 1988

Submitted Pursuant To Third Circuit Rule 12(6)
August 8, 1988

Before: GIBBONS, *Chief Judge*
WEIS, *Circuit Judge*, and
POLLAK,* *District Judge*

Filed September 15, 1988

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* The Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

WEIS, Circuit Judge.

This court's judgment order of June 29, 1987 affirmed the order of the district court denying the plaintiff's requests for additional postjudgment interest and reopening of the royalties issue in this prolonged patent infringement case. The United States Supreme Court has remanded the case for reconsideration in light of *Christianson v. Colt Indus. Operating Corp.*, —— U.S. ——, 108 S. Ct. 2166 (1988). Based on our study of *Christianson* and the record before us, we will reaffirm our previous decision.

The *Devex* [1] litigation has proceeded for more than thirty years and has come before this court on several other occasions. The original complaint, alleging infringement on a patented process for cold-forming operations on steel products used in bumper and non-bumper parts

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[1] In its March 1987 brief on the merits. Technograph states:

> "The only appellant in this case is Technograph Liquidating Trust, successor to Technograph, Inc., a North Carolina Corporation. The other named plaintiffs below—Devex Corporation, William C. McCoy, Jr., individually and as an Executor of the Estate of William C. McCoy, deceased, Theodore A. TeGrotenhuis, Frederick B. Ziesenheim, Majorie TeGrotenhuis, and Katherin M. Bassett—no longer have any interest in this litigation."

Brief for Appellant at 1-2 n.2, Devex v. General Motors Corp., 822 F.2d 52 (3d Cir. 1987) (No. 86-5771).

for automobiles, was filed in 1956 in Chicago. After the district court found that the patent was invalid, the Court of Appeals for the Seventh Circuit reversed and remanded for trial. *Devex Corp. v. Houdaille Indus., Inc.*, 382 F.2d 17 (7th Cir. 1967).

The plaintiff then transferred the case to Delaware, where the district court found no infringement. We reversed in 1972, *Devex Corp. v. General Motors Corp.*, 467 F.2d 257 (3d Cir. 1972), *cert. denied*, 411 U.S. 973 (1973). A Special Master took up the case for an accounting and assessment of damages. He recommended an award for the infringement attributable to bumper manufacture but denied recovery for non-bumper processing. The finding on the non-bumper aspect was approved by the district court, *Devex Corp. v. General Motors Corp.*, 494 F. Supp. 1369 (D. Del. 1980), and damages of $8.8 million were awarded for the bumper infringement as well as $11 million in prejudgment interest plus postjudgment interest and costs.

In 1981, we affirmed the district court's decision. *Devex Corp. v. General Motors Corp.*, 667 F.2d 347 (3d Cir. 1981). In a petition for certiorari filed in 1982, the plaintiff asserted error in this court's denial of damages for infringement in processing non-bumper parts. The Supreme Court denied this petition, *General Motors Corp. v. Devex Corp.*, 456 U.S. 939 (1982), although it granted certiorari on the issue of prejudgment interest.

In *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983), the Court remanded the case to the district court for rulings on postjudgment interest and interest on costs. After the district court had taken appropriate action, we affirmed its rulings in 1984. *Devex Corp. v. General Motors Corp.*, 577 F. Supp. 429, *aff'd*, 749 F.2d 1020 (3d Cir. 1984) (Gibbons, J., dissenting).

The case came before the Supreme Court again in 1985, when plaintiff argued that our decision on the

issue of postjudgment interest was not in harmony with the holdings of other Courts of Appeals, particularly those of the Federal Circuit. Plaintiff also asked the Court once again to review the non-bumper part infringement. The Court denied both requests, *Devex Corp. v. General Motors Corp.*, 474 U.S. 890 (1985); *Technograph, Inc. v. General Motors Corp.*, 474 U.S. 819 (1985).

Most recently, in 1986, plaintiff appeared in the district court in Delaware where, in addition to the postjudgment interest issue, an argument was made that a conflict exists between our 1981 denial of royalties and later decisions in the Federal Circuit. *See Railroad Dynamics, Inc. v. A. Stucki Co.*, 727 F.2d 1506 (Fed. Cir.), *cert. denied*, 469 U.S. 871 (1984).

Plaintiff filed its 1986 appeal in the United States Court of Appeals for the Federal Circuit. That court transferred the appeal to us pursuant to 28 U.S.C. § 1631 and "in the interests of comity and judicial economy." Plaintiff then moved to transfer the case back to the Federal Circuit on the ground that it had exclusive jurisdiction over the appeal under 28 U.S.C. § 1295(a)(1). The Federal Circuit denied plaintiff's motion for rehearing and its request for *in banc* consideration of the transfer order. Once again, the plaintiff asked for certiorari but the Supreme Court denied the petition. *Technograph Liquidating Trust v. General Motors Corp.*, —— U.S. ——, 107 S. Ct. 1372 (1987); *Technograph Liquidating Trust v. General Motors Corp.*, —— U.S. ——, 107 S. Ct. 1374 (1987).

The procedural chronology of the case before us reveals that all phases disputing actual patent issues had been concluded in the district court, this court, and the Supreme Court by 1982—before the Federal Circuit came into existence. The Devex patent itself expired in 1969, and only damages were involved in most of the litigation. The remaining issues dealt essentially with postjudgment

interest and interest on costs, and did not raise questions of the validity of the patent or of its infringement.

In *Christianson* the Court emphasized the doctrine of the law of the case, directing that when a court decides upon a rule of law, that rule should continue to govern the same issues in subsequent stages in the litigation. *Id.* at 2177. Although a court has the power to revisit prior decisions, "as a rule courts should be loathe to do so in the absence of extraordinary circumstances." *Id.* at 2178.

Unlike the situation in *Christianson*, this court did not bounce this appeal back to the Court of Appeals for the Federal Circuit, but instead, entertained and decided the case. To transfer the case to the Federal Circuit at this stage of almost interminable litigation would be to engage in what the Supreme Court so aptly described as "a perpetual game of jurisdictional ping pong." *Christianson*, 108 S. Ct. at 2179.

An additional factor distinguishes this case from *Christianson*. Here the Supreme Court denied certiorari after the Federal Circuit declined jurisdiction and transferred the case to this court. The lengthy history of this litigation and the substantial reasons supporting the Federal Circuit's order, at best, makes this what the Supreme Court characterized as a "marginal jurisdictional dispute." *Id.* at 2179. In that scenario, the *Christianson* Court admonished "[u]nder law-of-the-case principles, if the transferee court can find the transfer decision plausible, its jurisdictional inquiry is at an end." *Id.* "The courts of appeals should achieve [quick settlement of questions of transfer] by adhering strictly to principles of law of the case." *Id.*

This court has followed the law of the case, and on reconsideration, therefore, has concluded that we should not disturb our earlier entry of judgment in favor of the defendant.

The order of the district court will be affirmed.

Pollack, District Judge, concurring

I concur in the judgment and opinion of the court. I write separately to underscore the particular elements of the matter that seem to me of controlling importance.

Judge Weis' opinion carefully identifies the major elements of this case's quasi-Dickensian litigation history. That history establishes two propositions which are in my mind dispositive of the issue presented by the Supreme Court's remand of this case for reconsideration in the light of its decision in *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166 (1988).

The first proposition is that the law of the case applicable to the issue before us—namely, that this court, and not the Federal Circuit, is the proper court of appeals to review the 1988 judgment of the District Court for the District of Delaware—was determined by the Federal Circuit in 1986. That determination was embodied in the Federal Circuit's orders (a) transferring to this court the appeal filed by Technograph, and (b) denying Technograph's motion for rehearing and *en banc* consideration of the transfer order—a motion predicated on Technograph's contention that the Federal Circuit had exclusive appellate jurisdiction.

The second proposition is that the ruling of the Federal Circuit that this court is the proper appellate tribunal, while perhaps not indisputably correct, was (whether viewed as of then or today) certainly not clearly wrong. Whatever may have been the character of this litigation at its inception, by 1986 the patent ingredients had essentially disappeared. ". . . [W]hether a claim arises under the patent laws may depend on the time when the question is asked." *Christianson*, 108 S.Ct. at 2179 (Stevens, J., concurring).

In their pioneering casebook in 1936, Thurman Arnold and Fleming James observed that "[t]he doctrine of the

'law of the case' arises from a head-on collision between the rules of stare decisis and res judicata." *Arnold and James, Cases on Trials, Judgments and Appeals* (1936) 215 n.42. Half a century later, perhaps we may modify that professorial pronouncement by characterizing law of the case as a pastiche of stare decisis and res judicata. Suffice it to say that the original rigor of law of the case has long since been ameliorated; however, that original rigor died hard. Compare *John v. Pierce*, 176 Wis. 220, 186 N.W. 600 (1922), with *McGovern v. Kraus*, 200 Wis. 64, 227 N.W. 300 (1929). Thus, in *Johnson v. Cadillac Motor Car Co.*, 261 F. 878 (2nd Cir. 1919), it was only by a divided vote that the Second Circuit, in 1919, found itself free, on a second appeal, to conclude that *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), decided by the New York Court of Appeals subsequent to the first appeal, was a judicial event of sufficient consequence to warrant a departure from the legal principles found to be dispositive on the first appeal. Viewing the problem as an aspect of stare decisis, the Second Circuit recognized "the general rule that on a second appeal matters disposed of on the first appeal ordinarily will not again be considered," but concluded that "the rule is not an inexorable one, and should not be adhered to in a case in which the court has committed an error which results in injustice, and at the same time lays down a principle of law for future guidance which is unsound and contrary to the interests of society." 261 F. at 886. In its extensive canvass of the case law, the Second Circuit quoted excerpts from the first paragraph of an opinion written in 1891 by Chief Justice Bleckley for the Supreme Court of Georgia, *Ellison v. Georgia Railroad & Banking Co.*, 87 Ga. 691, 13 S.E. 809, 810 (1891). The first paragraph of the opinion in *Ellison* deserves quotation in full:

> Some courts live by correcting the errors of others and adhering to their own. On these terms courts of

final review hold their existence, or those of them which are strictly and exclusively courts of review, without any original jurisdiction, and with no direct function but to find fault, or see that none can be found. With these exalted tribunals, who live only to judge the judges, the rule of *stare decisis* is not only a canon of the public good, but a law of self-preservation. At the peril of their lives they must discover error abroad, and be discreetly blind to its commission at home. Were they as ready to correct themselves as others, they could no longer speak as absolute oracles of legal truth; the reason for their existence would disappear, and their destruction would speedily supervene. Nevertheless, without serious detriment to the public or peril to themselves, they can and do admit now and then, with cautious reserve, that they have made a mistake. Their rigid dogma of infallibility allows of this much relaxation in favor of truth unwittingly forsaken. Indeed, reversion to truth, in some rare instances, is highly necessary to their permanent well-being. Though it is a temporary degradation from the type of judicial perfection, it has to be endured, to keep the type itself respectable. Minor errors, even if quite obvious, or important errors, if their existence be fairly doubtful, may be adhered to, and repeated indefinitely; but the only treatment for a great and glaring error affecting the current administration of justice in all courts of original jurisdiction is to correct it. When an error of this magnitude, and which moves in so wide an orbit, competes with truth in the struggle for existence, the maxim for a supreme court,—supreme in the majesty of duty as well as in the majesty of power,—is not *stare decisis*, but *fiat justitia ruat coelum*.

The Court's opinion in *Christianson* makes plain that the legacy of Chief Justice Bleckley, tempered by the

Second Circuit's more modest rhetoric in *Johnson v. Cadillac Motor Co.*, is alive and well in the federal courts today. According to *Christianson*, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance . . ." But "as a rule, courts should be loathe to do so in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.'" 108 S.Ct. at 2178. Since such "extraordinary circumstances" are not presented here, I agree that there is no occasion to depart from our prior acquiescence in the Federal Circuit's order transferring this matter to this court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

SUPREME COURT OF THE UNITED STATES

No. 87-682

TECHNOGRAPH LIQUIDATING TRUST,
Petitioner,

v.

GENERAL MOTORS CORPORATION

Case below, *Devex Corp. v. General Motors Corp.*, 638 F.Supp. 940; 822 F.2d 52.

June 27, 1988. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Third Circuit for further consideration in light of *Christianson v. Colt Industries Operating Corp.*, 486 U.S. ——, 108 S.Ct. 2166, 99 L.Ed.2d —— (1988).